* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **IA No. 12354/2007 in CS(OS) No. 1119/2001**

% **Date of Decision: March 04, 2009**

GE Capital Services India ..... Plaintiff

! Through: Mr. Divjyot Singh, Advocate

Versus

$ G. Neuromed Diagnostic Centre Pvt. Ltd.
.....Defendant

^ Through: Mr. Maneesh Singh, Advocate for D-3.

CORAM:

HON'BLE MR. JUSTICE S.N. AGGARWAL

1. Whether reporters of Local paper may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

S.N.AGGARWAL, J (ORAL)

This is an application under Order 37 Rule 4 read with Order 13 Rule 9 CPC filed by defendant no. 3 seeking setting aside of ex parte decree dated 22.02.2002 decreeing the suit against defendant nos. 3 to 5 under Order 37, CPC for Rs. 88,23,687/-. The decree against defendant no. 5 was set aside vide order passed on 11.11.2005 and during hearing of leave to defend application, counsel for the plaintiff gave up its

claim against defendant no. 5 because he had not stood personal guarantee or was a party to the loan transaction on behalf of defendant no. 1 and, therefore, the decree passed against defendant nos. 3 to 5 on 22.02.2002 was modified by an order passed on 12.10.2007 and it was clarified that the decree dated 22.02.2002 will stand only against defendant nos. 3 and 4. A separate decree for the suit amount of Rs. 88,23,687/- with costs and interest @ 18% per annum was passed by this court against defendant no. 1 and 2 on 12.10.2007.

Defendant no. 3 who has filed the instant application seeking setting aside of ex parte decree passed against him under Order 37, CPC on 22.02.2002, contends that he was not served with the summons of the suit in which decree has been passed against him. It is submitted by learned counsel appearing on behalf of defendant no. 3 that the summons of the suit were sent to defendant no. 3 mentioning his address as 117/43 instead of 117/46, Sarvodaya Nagar, Kanpur. Counsel appearing on behalf of the plaintiff/decree holder says that though it is true that summons of the suit were sent to defendant no. 3 at wrong address but he has argued that still the ex parte decree passed against defendant no. 3 cannot be set aside because the defendant no. 3 has not disclosed any ground in the instant application which may entitle him to grant of leave to contest the suit in which decree has been passed against him.

Counsel for the plaintiff has relied upon a judgment of the Supreme Court in *Rajni Kumar Versus Suresh Kumar Malhotra and Another;* **(2003) 5 SCC 315,** wherein in paragraph 11 of the said judgment, it was held as under :

> *"It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex-parte decree, it extends to staying or setting aside the execution and giving leave to appear to summons and to defend the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal of the suit filed thereunder, Rule 4 empowers the Court to grant leave to the defendant to appear to summons and defend the suit if the Court considers it reasonable so to do, on such terms as the Court thinks fit in addition to setting aside the decree. Where on an application, more than one among the specified reliefs may be granted by the court, all such relief must be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear in response to summons and limitation expired, or having appeared, did not apply for leave to defend the suit in the prescribed period, the Court is empowered to grant leave to the defendant to appear to the summons and defend the suit in the same application. It is therefore not enough for the defendant to show special circumstances which prevented him from appearing or*

applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9.

Relying on the above judgment of the Supreme Court in Rajni Kumar's case (supra), counsel appearing on behalf of the plaintiff has argued that the provisions of Order 37 Rule 4, CPC are different from the provisions contained in Order 9 Rule 13.

The submission of the counsel for the decree holder is that the defendant no. 3 has failed to disclose the ground in the instant application which might have entitled him for grant of leave to contest the suit and according to learned counsel, since the defendant no. 3/applicant has failed to disclose any such ground in the application which may entitle him to leave, the application merits dismissal outrightly.

Per contra, counsel appearing on behalf of the applicant/defendant no. 3 states that defendant no. 3 has disclosed the ground in the rejoinder to the reply of the plaintiff/decree holder and if those facts are considered by the court, then it according to him, will raise a triable issue. I am of the view that the pleadings contained in the rejoinder cannot be considered as grounds entitling the applicant for leave to contest the suit as firstly, there is no provision in the CPC for filing of

rejoinder and secondly, the rejoinder can be filed only with regard to facts disclosed by the opponent in the reply to the application. What the court has to consider is the pleading of the applicant contained in his application filed for setting aside of ex parte decree. A perusal of the application filed by the applicant/defendant no. 3 under Order under Order XXXVII CPC Rule 4 would show that the applicant has not whispered any such plea in his application which may give rise to a dispute requiring a trial in the case. It may be noted that admittedly the defendant no. 3 who has filed the instant application was one of the Directors of the defendant no.1 company at the relevant time. It may further be noted that defendant nos. 2 and 4 are other Directors of the defendant no. 1 company and have contested the suit on almost the same grounds which have been mentioned by the applicant/defendant no. 3 in his rejoinder but they were not successful in their pleas. The decree passed against defendant no. 1, 2 and 4 was upheld by the Division Bench of this court in an appeal being RFA(OS) No. 87/2007 vide order passed on 03.02.2009.

The decree against defendant no. 3, being one of the Directors of the defendant company, was passed way back in 2002. The instant application has been filed by the applicant after more than five years of passing of the decree against him. It is difficult to believe that the

applicant, being the Director of defendant no. 1 company, would not know about the pendency of the proceedings in the present suit or passing of the decree against the defendant no. 1 company and other Directors including himself. It appears that the instant application has been filed with an intention to delay the payment of the plaintiff under the decree in its favour.

In view of the above, I do not find any merit in the instant application which fails and is hereby dismissed with costs quantified at Rs. 15000/-.

MARCH 04, 2009 **S.N.AGGARWAL, J**
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